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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MARIO BAGUADA, Defendant and Appellant.	2d Crim. No. B284578 (Super. Ct. No. F490936005) (San Luis Obispo County)

Mario Baguada appeals from a postjudgment order denying his motion under Penal Code[1] section 1473.7 to vacate his 2013 conviction for conspiracy to transport marijuana (Health & Saf. Code, § 11360, subd. (a)). Appellant contends the motion should have been granted on the ground that his trial attorney provided ineffective assistance of counsel by failing to advise him of the adverse immigration consequences of his non contest plea to the charge of which he was convicted. We affirm.

[1] All statutory references are to the Penal Code unless otherwise stated.

FACTS AND PROCEDURAL HISTORY

In May 2013, appellant and 13 others were arrested after they were caught smuggling approximately 1,900 pounds of marijuana into the country from a panga boat in the Pacific Ocean. He was subsequently charged with one count each of possessing marijuana for sale (Health & Saf. Code, § 11359), transporting marijuana (*id.*, § 11360, subd. (a)), and employing a minor to sell or carry marijuana (*id.*, § 11361, subd. (a)), and one count of conspiracy to commit all three crimes (§ 182, subd. (a)). The charge of employing a minor to sell or carry marijuana included an allegation that a principal was armed with a firearm during commission of the offense (§ 12022, subd. (a)(1)).

Appellant initially pled not guilty on all counts and denied the firearm use allegation. He subsequently pled no contest to conspiracy to transport marijuana. In exchange for his plea, he was sentenced to three years in county jail and the remaining charges were dismissed. At the change of plea hearing, the court told appellant "[i]f you are not a citizen of the United States, you could be denied citizenship, you could be deported or you could be excluded from the United States. Do you understand that?" Appellant replied that he did and verified that he "had enough time to discuss [the] case with" his attorney, Jeffrey D. Stulberg. The court also asked Stulberg if he had "discussed with [appellant] his rights, defenses and the possible consequences of his plea," and Stulberg responded, "Yes. We met on at least four occasions, your honor."

After appellant completed his sentence, federal removal proceedings were initiated against him. In February 2017, appellant filed a motion to vacate his conviction pursuant to section 1473.7. In support of the motion, appellant submitted a declaration stating, among other things, that "[a]t no time before

I pled, did my defense counsel [Stulberg] ever discuss or warn me against any immigration consequences from my plea or conviction." Appellant also asserted that Stulberg "never had any meaningful consultations with me before or during my plea hearing."

Stulberg testified at the hearing on the motion. At the hearing on the motion, appellant first called Stulberg to testify. Throughout his representation, Stulberg knew that appellant was not a United States citizen. After the prosecution offered its plea deal of three years for conspiracy, the plea deal that appellant ultimately accepted, Stulberg visited appellant at the county jail and informed him of the offer. Because the evidence against appellant was overwhelming, Stulberg recommended that he accept the deal.

Appellant told Stulberg to speak with appellant's wife, who would give Stulberg the contact information for appellant's immigration attorney. After Stulberg spoke to appellant's immigration attorney, they both agreed that appellant would ultimately be deported if he accepted the plea. Immigration counsel asked Stulberg if he could try to obtain an offer for appellant to plead to a non-deportable offense such as simple possession of marijuana. When Stulberg tried to negotiate such an offer, the prosecutors "essentially laughed at [him]." Stulberg was told, "that's the deal. Tell your client to take it or leave it."

Stulberg conveyed this information to appellant and told him that if he took the offered plea, he would be pleading to an aggravated felony and "would be deported after he was released from prison." Stulberg also told appellant he "would be permanently excluded; in other words, not just sent back and allowed to return." Stulberg denied telling appellant that if he got deported, he could simply return the next day using a coyote.

Appellant testified that Stulberg never asked him about his immigration status or informed him of the immigration consequences of his plea. Two to three weeks after entering his plea, he asked Stulberg to "reopen the case" because he did not want to be deported. According to appellant, Stulberg told him he would probably receive a six-year prison sentence if he withdrew his plea and that if he were deported he could find a coyote and "come back the next day." Appellant also asserted that he never would have entered his plea had he known it would mandate his deportation.

The court denied appellant's motion. The court found that "Stulberg's testimony is credible and that he did fully advise [appellant] on the immigration consequences of [his] plea." The court added: "Mr. Stulberg said that he told [appellant he was] going to be deported and that [he] would be unable to come back to the United States. . . . And when he testified that he spoke to the immigration lawyer at the request of [appellant's] then-wife, that he did so prior to [appellant] taking that plea from the D.A.'s office. I also found [Stulberg] credible when he said that he went to the D.A.'s office and attempted to negotiate a better plea for [appellant], and that he went [back] again to speak to the D.A. after speaking to the immigration lawyer from Los Angeles." The court further noted the People's case against appellant was "really strong" and told appellant, "I don't find you credible . . . when you say, 'I would have gone to trial . . . rather than accept this plea with the deportation consequences.'"

DISCUSSION

Appellant contends that his motion to vacate his conviction under section 1473.7 was erroneously denied. We disagree.

Section 1473.7 provides in pertinent part: "A person who is no longer in criminal custody may file a motion to vacate a

conviction or sentence [if] . . . [t]he conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (*Id.*, subd. (a)(1).) The statute "allows a defendant, who is no longer in custody, to challenge his or her conviction based on a mistake of law regarding the immigration consequences of a guilty plea or ineffective assistance of counsel in properly advising the defendant of the consequences when the defendant learns of the error postcustody." (*People v. Perez* (2018) 19 Cal.App.5th 818, 828.) The burden is on the defendant to show, by a preponderance of the evidence, that he or she is entitled to the requested relief. (*Id.* at p. 829.)

"Ineffective assistance of counsel that damages a defendant's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea, if established by a preponderance of the evidence, is the type of error that entitles the defendant to relief under section 1473.7. [Citation.] To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by the deficient performance. [Citations.]" (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75) (*Ogunmowo*).

In reviewing appellant's claim, "[w]e accord deference to the trial court's factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel's deficient performance and resulting prejudice to the

defendant." (*Ogunmowo*, *supra*, 23 Cal.App.5th at p. 76, citing *In re Resendiz* (2001) 25 Cal.4th 230, 249 (*Resendiz*).)

"In ruling on a motion to withdraw a plea, the trial court may take into account the defendant's credibility and his or her interest in the outcome of the proceedings. [Citation.] We will defer to a trial court's credibility determinations that are supported by substantial evidence. [Citation.]" (*People v. Dillard* (2017) 8 Cal.App.5th 657, 665.) Appellant's motion was premised upon the assertion that Stulberg provided constitutionally ineffective assistance by misadvising him regarding the immigration consequences of his plea, and by failing to negotiate an "immigration safe" plea deal on his behalf. Stulberg testified, however, that he *did* advise appellant that his plea would result in his deportation. Stulberg also testified that his efforts to negotiate a plea deal that would avoid such a consequence were flatly rebuffed by the prosecution. The court found Stulberg's testimony to be credible, and substantial evidence supports this finding. (See *Dillard*, at p. 665.) Because appellant failed to show that counsel's performance was constitutionally deficient, his claim of ineffective assistance necessarily fails. (*People v. Tapia* (2018) 26 Cal.App.5th 942, 953.)

Moreover, a defendant's assertion that he would not have entered a plea but for counsel's misadvisements or failure to advise regarding the immigration consequences of the plea "'must be corroborated independently by objective evidence.'" (*Resendiz*, *supra*, 25 Cal.4th at p. 253.*)* Appellant's evidence that he would not have pled guilty consists solely of his own declaration and testimony. There is nothing to corroborate his self-serving claim that he would have rejected the prosecution's plea deal and insisted on going to trial had he known a conviction of conspiracy to transport marijuana would mandate his deportation. By

pleading no contest to that charge, he avoided prison and several other serious charges against him were dismissed. Although appellant testified to his belief that the evidence against him was weak, the trial court correctly concluded that the People's case—which included evidence of statements appellant made following his arrest in which he essentially admitted his guilt—was "very, very strong." Because appellant failed to demonstrate the requisite prejudice, his claim of ineffective assistance of counsel was properly denied. (*Resendiz*, *supra*, 25 Cal.4th at p. 249.)

DISPOSITION

The order denying appellant's motion to vacate his conviction under section 1473.7 is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Michael L. Duffy, Judge
Superior Court County of San Luis Obispo

Leonard Chaitin for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Toni R. Johns Estaville, Deputy Attorney General, for Plaintiff and Respondent.